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ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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HEARING CLERK

IN THE MATTER OF:
Poudre River Site
Fort Collins, Colorado

ADMINISTRATIVE ORDER ON
CONSENT FOR REMOVAL ACTION

Public Service Company of Colorado,
d/b/a XCEL Energy, Inc.; Schrader Oil Co.;
and City of Fort Collins, Colorado;

U.S. EPA Region 8
CERCLA Docket No. **CERCLA-08-2005-0003**

Respondents

Proceeding Under Sections 104, 106(a), 107
and 122 of the Comprehensive
Environmental Response, Compensation,
and Liability Act, as amended, 42 U.S.C. §§
9604, 9606(a), 9607 and 9622

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Public Service Company of Colorado, d/b/a XCEL Energy, Inc. ("PSCo"); Schrader Oil Co. ("Schrader"); and City of Fort Collins, Colorado ("City"); ("Respondents"). This Order provides for the performance of a removal action by PSCo, the recordation of specific restrictive covenants by the Respondents and the reimbursement of certain response costs incurred by the United States at or in connection with the property located in the vicinity of the Poudre River and the Aztlan Center in Fort Collins, Colorado (the "Poudre River Site" or the "Site") by PSCo and Schrader.

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA").

3. EPA has notified the State of Colorado (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Each Respondent agrees to comply with and be bound by the terms of this Order that apply to it and further agrees that it will not contest the basis or validity of this Order or its terms.

II. PARTIES BOUND

5. This Order applies to and is binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Order.

6. Respondents PSCo and Schrader are jointly and severally liable for carrying out all activities required of them by this Order. Wherever this Order imposes an obligation on PSCo, PSCo shall perform the obligation in the first instance. However, Schrader remains legally bound to perform such obligations and is jointly and severally liable for all such obligations. In the event of the insolvency or other failure of PSCo or Schrader to implement the requirements of this Order, the other shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Each Respondent shall be responsible for any noncompliance with the terms of this Order that apply to it.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum" shall mean the EPA Action Memorandum relating to the Site, by the Assistant Regional Administrator for Ecosystems Protection and Remediation, EPA Region 8, or his/her delegate, and all attachments thereto. The "Action Memorandum" is attached as Appendix A.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Order as provided in Section XXXI.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "CDPHE" shall mean the Colorado Department of Public Health and Environment and any successor departments or agencies of the State.

g. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 27 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 39 (emergency response) and Paragraph 66 (work takeover). Future Response Costs shall also include all Interim Response Costs and all Interest on those Past Response Costs Respondents have agreed to reimburse under this Order that have accrued pursuant to 42 U.S.C. § 9607(a) during the period from June 30, 2004 to the Effective Date.

h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

i. "Interim Response Costs" shall mean all costs, including direct and indirect costs, a) paid by the United States in connection with the Site between July 1, 2004 and the Effective Date, or b) incurred prior to the Effective Date, but paid by the United States after that date.

j. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

k. "Order" shall mean this Administrative Order on Consent and all appendices attached hereto (listed in Section XXX). In the event of conflict between this Order and any appendix, this Order shall control.

l. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

m. "Parties" shall mean EPA, PSCo, Schrader and the City.

n. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through June 30, 2004, plus Interest on all such costs through such date.

o. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

p. "Removal Action Plan" shall mean the plan for work by which the removal action will be implemented, as set forth in Appendix B to this Order, and any modifications made thereto in accordance with this Order.

q. "Respondents" shall mean PSCo, Schrader and the City.

r. "Section" shall mean a portion of this Order identified by a Roman numeral.

s. "Site" shall mean the Poudre River Superfund Site, located in the vicinity of the Poudre River and the Aztlan Center in Fort Collins, Colorado and depicted generally on the map attached as Appendix E. Specifically, the Site shall include all areas having been affected, currently affected or to be affected in the future by the non-aqueous phase liquid ("NAPL") plume. A map of the NAPL plume is attached to this Order as Appendix F and is incorporated by reference herein.

t. "State" shall mean the State of Colorado.

u. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and 4) any "hazardous material" under State law.

v. "Work" shall mean all activities PSCo and Schrader are required to perform under this Order, including, but not limited to, all actions necessary to address the removal action objectives for NAPL within the delineated plume area, which is described in Appendix F. The removal action objectives are described in the removal action plan, which is attached as Appendix B.

IV. FINDINGS OF FACT

9. The Poudre River Site is located along the Cache La Poudre River in Fort Collins, Colorado.

10. During the early twentieth century, the Poudre Valley Gas Company produced gas from coal and possibly oil at a location within the Site boundaries and to the southwest of the Poudre River ("gas plant property"). The gasification plant closed in approximately 1926. PSCo is the successor to Poudre Valley Gas Company, the operator of the gasification plant. The property on which the gasification plant was located is currently owned by Schrader Oil Company and PSCo. The City of Fort Collins owns property between the gas plant property and the Poudre River, a portion of which was used in the past for landfill purposes. The Aztlan Community Center and the United Way Building are located on top of the old landfill.

11. Investigation of the Site has revealed a plume of NAPL. The NAPL consists of a variety of volatile and semi-volatile organic compounds, chiefly polyaromatic hydrocarbons, including benzene, naphthalene and xylene. It is a black oily/tarry liquid, slightly denser and more viscous than water. It is derived from discarded materials associated with the former coal gasification plant. Free product is present on the Schrader property and under the parking lot of the Aztlan Center. The plume of NAPL extends to the Poudre River and is found both above bedrock and in fissures in the bedrock. The NAPL has been observed in the Poudre River. The concentrations of organic compounds in the NAPL exceed ambient water quality criteria and other ecological sediment screening values.

12. There have been two documented releases of petroleum substances on the Schrader property, occurring in approximately 1994 and 1997. Both releases are currently the subject of State-approved corrective actions. Samples taken during the corrective actions indicate the presence of benzene, toluene, ethylbenzene and xylenes in the soil and groundwater. These substances are also found in the NAPL plume. The releases may be affecting the mobility of the NAPL plume.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

13. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

- a. The Poudre River Site is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. The contamination found at the Site, as identified in the Findings of Fact above, includes “hazardous substances” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
- c. Each Respondent is a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- d. PSCo and Schrader are responsible parties under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for performance of response action and for response costs incurred and to be incurred at the Site.
 - i. PSCo is the current owner of property on the Site and is therefore an “owner” of a facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1), 42 U.S.C. § 9607(a)(1). In addition, PSCo was the “owner” and/or “operator” of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

- ii. Schrader is the current owner of property on the Site and is therefore an “owner” of a facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1), 42 U.S.C. §9607(a)(1).

e. The conditions described in the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The release of hazardous substances at the Site, if unaddressed, may present an imminent and substantial endangerment to human health and the environment.

g. The removal action required by this Order is necessary to protect the public health or welfare or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that each Respondent shall comply with all of the provisions of this Order that apply to it, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

14. PSCo shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within thirty (30) days of the Effective Date. PSCo shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least five (5) days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by PSCo. If EPA disapproves of a selected contractor,

PSCo shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within fifteen (15) days of EPA's disapproval.

15. PSCo has selected, and EPA has approved, Jennifer McCarter as Project Coordinator. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, PSCo shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within five (5) days following EPA's disapproval. Receipt by PSCo's Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by all PSCo.

16. EPA has designated Paul Peronard of the Preliminary Assessment and Emergency Response Branch as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Order, Respondents shall direct all submissions required by this Order to the OSC at EPA, EPR-ER, 999 18th Street, Suite 300, Denver, CO 80202.

17. EPA and PSCo shall have the right, subject to Paragraph 15, to change their respective designated OSC or Project Coordinator. PSCo shall notify EPA three (3) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

18. PSCo shall perform, at a minimum, all actions necessary to implement the Removal Action Plan. The actions to be implemented generally include, but are not limited to, the following:

The Work to be performed pursuant to this Order includes:

- Excavation of soil, sediment and bedrock within a predetermined NAPL impacted area designated by the Removal Action Plan;
- Construction of a vertical barrier wall, including a hydraulic containment trench and water treatment plant, to, among other things, intercept any NAPL moving into the Poudre River;

- Operation of the hydraulic containment until it is no longer needed to stop NAPL releases to the Poudre River;
- Implementation and compliance with institutional controls; and
- Restoration of the Poudre River corridor affected by the removal action.

19. Work Plan and Implementation.

a. Within thirty (30) days after the Effective Date, PSCo shall implement the EPA approved Removal Action Plan for performing the removal action, which is attached as Appendix B and generally described in Paragraph 18 above. The schedule for the actions required by this Order is included in the Removal Action Plan. PSCo shall implement the Removal Action Plan as approved in writing by EPA in accordance with the schedule approved by EPA. The Removal Action Plan, the schedule, and any subsequent modifications are and shall be incorporated into and become fully enforceable under this Order.

b. Throughout the implementation of the removal action outlined in the Removal Action Plan, sampling, monitoring and analysis of various environmental media will be required. This sampling, monitoring and analysis shall be documented in a Site Sampling and Analysis plan. This EPA-approved plan shall be included in the final Removal Action Plan and shall comply with EPA standards for QAPPs and QA/QC.

c. By November 23, 2004 PSCo shall incorporate a final EPA-approved restoration plan into the final removal action design which will be incorporated into the Removal Action Plan. The restoration plan shall be attached and incorporated by reference into this Order.

d. PSCo shall not commence any Work except in conformance with the terms of this Order.

20. Health and Safety Plan. Within thirty (30) days after the Effective Date, PSCo shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Order. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health

Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. PSCo shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

21. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. PSCo shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. PSCo shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. PSCo shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, PSCo shall have such a laboratory analyze samples submitted by EPA for QA monitoring. PSCo shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, PSCo or any other Respondent taking samples relating to the Work under this Order, shall allow EPA or its authorized representatives to take split and/or duplicate samples. PSCo or any other Respondent taking samples relating to the Work under this Order shall notify EPA not less than three (3) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondents to take split or duplicate samples of any samples it takes as part of its oversight of PSCo's implementation of the Work. Any Respondent may take a "sample of

opportunity” with less than three (3) days notice to EPA, or where necessary, without prior notification to EPA, but shall, at a minimum, notify any on-site EPA personnel or representatives prior to or during sample collection and shall orally notify EPA within 24 hours of such sampling event. For purposes of this Order, a “sample of opportunity” is defined as an unplanned sampling event that would facilitate the Work to be performed under this Order, the collection of which could not be accomplished with a three (3) day notification requirement.

d. Except as otherwise provided, all data required to be submitted pursuant to this Order must be formatted according to EPA Region 8’s most current *Standard Guidance to Format Sample Results, Field Measurements and Associated Metadata*. All GIS format data, aerial photos, and CAD drawing data layers acquired or developed in support of EPA projects must be submitted to EPA. GIS formats acceptable include all ESRI software compatible formats such as coverages, shapefiles, GRID format files, ArcExport format files, and Arc8x (mxd) formatted projects. All data incorporated for submission to EPA are required to have full Federal Geographic Data Committee (FGDC) compliant metadata associated with each layer file to facilitate georeferencing and conversions. All aerial photos acquired in support of EPA projects must be submitted to EPA. Aerial photos must include world files or other common source for georeferencing and dating. All data layers used to produce CAD drawings will be submitted as data layer separates (dxf). CAD data layers should include georeference documentation. All GIS, aerial photographs, and CAD data may be submitted in the formats described above on CD-ROM. All design and construction data will be delivered in a CAD format in a site-specific local coordinate system.

22. Operation, Monitoring and Maintenance. In accordance with the Removal Action Plan, or as otherwise directed by EPA, PSCo shall submit a proposal for operation, monitoring and maintenance consistent with Section 300.415(l) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA approval, PSCo shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements. All Respondents shall implement the reasonable steps described within this Order and attached to this Order as Appendix G.

23. Reporting.

a. PSCo shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order every 30th day after the Effective Date until termination of this Order, unless otherwise directed in writing by the OSC. PSCo may request at any time that EPA change the frequency of progress reports. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Each Respondent shall submit three (3) copies of all plans, reports or other submissions required to be submitted by it pursuant to this Order. Upon request by EPA, each Respondent shall submit such documents in electronic form.

c. Each Respondent who owns or controls property at the Site shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to EPA and the State of the proposed conveyance, including the name and address of the transferee. Each Respondent who owns or controls property at the Site also agrees to require that its successors comply with the immediately proceeding sentence and Sections IX (Site Access) and X (Access to Information).

24. Final Reports. Within one hundred twenty (120) days after commencement of operation of the hydraulic containment system as set forth in the Removal Action Plan, PSCo shall submit for EPA review and approval a draft "Preliminary Report" summarizing the actions taken to comply with this Order and reflecting analysis of the first one hundred twenty (120) days of operation. PSCo shall submit a final Preliminary Report within ninety (90) days of receiving EPA's comments on the draft Preliminary Report. Within one hundred twenty (120) days after EPA has determined that the hydraulic containment system can be permanently shut down and all other Work required by this Order has been completed, PSCo shall submit for EPA review and approval a draft "Completion Report" summarizing all of the actions taken to comply with this Order. PSCo shall submit a final Completion Report within ninety (90) days of receiving EPA's comments on the draft report. The final Completion Report shall conform, at a

minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final Completion Report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Order, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final Completion Report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete in all material respects."

25. Off-Site Shipments.

a. PSCo shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. PSCo shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. PSCo shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by PSCo following the award of the contract for the removal action. PSCo shall provide the information required by Paragraph 25(a) and 25(b) as soon

as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances or pollutants or contaminants from the Site to an off-site location, PSCo shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. PSCo shall only send hazardous substances or pollutants or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. SITE ACCESS

26. If the Site, or any other property where access is needed to implement this Order, is owned or controlled by any of the Respondents, such Respondents shall, commencing on the Effective Date, provide EPA and its representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order.

27. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondents, each Respondent responsible for that action shall use its best efforts to obtain all necessary access agreements within fifteen (15) days after the Effective Date, or as otherwise specified in writing by the OSC. Each of said Respondents shall immediately notify EPA if after using its best efforts it is unable to obtain such agreements. For purposes of this Paragraph and the paragraph concerning institutional controls, "best efforts" includes the payment of reasonable sums of money in consideration of access. Each of said Respondents shall describe in writing its efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Each Respondent for whom EPA has taken such enforcement actions shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

28. Each Respondent shall, within thirty (30) days of the Effective Date, implement institutional controls on Property it owns within the Site. Each

Respondent shall execute and record in the Recorder's Office of Larimer County, Colorado, a restrictive covenant, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Order, subject to the requirements of Paragraphs 26 and 27 above, and (ii) grants the right to enforce the land use restrictions more fully developed as Appendix H to this Order.

Respondents shall grant the access rights and the rights to enforce the land use restrictions to all property owners within the Site who also execute and record the restrictive covenant. EPA will make initial contact with property owners within the Site who are not Respondents to request their participation in implementing and complying with the institutional controls. Respondents shall thereafter make best efforts to have such property owners who are not Parties to this Order execute and record the restrictive covenant. Respondents shall describe in writing their efforts to obtain such actions by landowners who are not signatories to this Order. EPA may then assist Respondents in obtaining such participation, to the extent necessary to effectuate the institutional controls described herein, using such means as EPA deems appropriate. PSCo and Schrader shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such participation, in accordance with the procedures in Section XV (Payment of Response Costs).

29. Within thirty (30) days of recording the restrictive covenant applicable to its property, each Respondent shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded restrictive covenant showing the clerk's recording stamps.

30. Notwithstanding any provision of this Order, EPA retains all of its access authorities and rights, as well as all of its rights to require land use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

31. Each Respondent shall provide to EPA and the State, upon written request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Each Respondent shall also make available to EPA and the State, for purposes of

investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

32. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and the State under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

33. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA and the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

34. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site, as provided for in Section 104(e)(7)(F) of CERCLA, 42 U.S.C. § 9604(e)(7)(F).

XI. RECORD RETENTION

35. Until 5 years after Respondents' receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), each Respondent shall preserve

and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 5 years after Respondents' receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondents shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

36. At the conclusion of this document retention period, Respondents shall notify EPA and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or the State, Respondents shall deliver any such records or documents to EPA or the State. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA or the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

37. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any material records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since negotiations commenced with EPA and that it has fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. COMPLIANCE WITH OTHER LAWS

38. Each Respondent shall perform all actions required to be performed by it pursuant to this Order in accordance with all applicable local, state, and federal

laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws. ARARs are identified in the Action Memorandum.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

39. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, PSCo shall immediately take all appropriate action. PSCo shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. PSCo shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer at (303) 293-1788 of the incident or Site conditions. In the event that PSCo fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, PSCo shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

40. In addition, in the event of any release of a hazardous substance from the Site which a Respondent has knowledge of, that Respondent shall immediately notify the OSC at (303) 293-1788 and the National Response Center at (800) 424-8802. Such Respondent shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

XIV. AUTHORITY OF ON-SCENE COORDINATOR

41. The OSC shall be responsible for overseeing Respondents' implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

XV. PAYMENT OF RESPONSE COSTS

42. Payment for Past Response Costs.

a. Within thirty (30) days after the Effective Date, PSCo and Schrader shall pay to EPA \$668,785.34 for Past Response Costs, with PSCo paying \$535,028.28 and Schrader \$133,757.06. However, pursuant to Paragraph 6, the liability of PSCo and Schrader is joint and several; the failure of one to pay shall require the other to pay the remainder. PSCo and Schrader shall each make the payment required by this Paragraph by a certified or cashier's check or by wire transfer made payable to "EPA Hazardous Substance Superfund" and shall include their name and address and the EPA Site/Spill ID number 08HE. PSCo and Schrader shall send the payment as indicated below:

For certified or cashier's check, payment must be received by 11:00 AM Eastern Time for same day credit and should be forwarded to one of the following addresses:

Regular Mail:

Mellon Bank
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, PA 15251-6859

Express Mail:

Environmental Protection Agency 360859
Mellon Client Service Center Rm 154-0670
500 Ross Street
Pittsburgh, PA 15262-0001

For wire transfer, payment must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004
TREAS NYC/CTR/
BNF=/AC-68011008

b. At the time of payment, PSCo and Schrader shall send notice that payment has been made to Kelcey Land, Cost Recovery Program Manager, ENF-RC, 999 18th Street, Suite 300, Denver, CO 80202.

c. The total amount to be paid by PSCo and Schrader pursuant to Paragraph 42(a) shall be deposited in the Poudre River Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

43. Payments for Future Response Costs.

a. PSCo and Schrader shall pay EPA all Future Response Costs not inconsistent with the NCP. PSCo shall pay 80% of Future Response Costs and Schrader 20%. However, pursuant to Paragraph 6, the liability of PSCo and Schrader is joint and several; the failure of one to pay shall require the other to pay the remainder. On a periodic basis, EPA will send PSCo and Schrader a bill requiring payment that includes a standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors. PSCo and Schrader shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 45 of this Order.

b. PSCo and Schrader shall make all payments required by this Paragraph by a certified or cashier's check or checks or by wire transfer(s) made payable to "EPA Hazardous Substance Superfund" and shall include their name and address and the EPA Site/Spill ID number 08HE. PSCo and Schrader shall send the payment(s) as indicated below:

For certified or cashier's checks, payment must be received by 11:00 AM Eastern Time for same day credit and should be forwarded to one of the following addresses:

Regular Mail:

Mellon Bank
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, PA 15251-6859

Express Mail:

Environmental Protection Agency 360859
Mellon Client Service Center Rm 154-0670
500 Ross Street
Pittsburgh, PA 15262-0001

For wire transfers, payment must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004
TREAS NYC/CTR/
BNF=/AC-68011008

c. At the time of payment, PSCo and Schrader shall send notice that payment has been made to Kelcey Land, Cost Recovery Program Manager, ENF-RC, 999 18th Street, Suite 300, Denver, CO 80202.

d. The total amount to be paid by PSCo and Schrader pursuant to Paragraph 43(a) shall be deposited in the Poudre River Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

44. In the event that the payment for Past Response Costs is not made within 30 days of the Effective Date, or the payments for Future Response Costs are not made within 30 days of PSCo's and Schrader's receipt of a bill, PSCo and Schrader shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or

sanctions available to the United States by virtue of PSCo's and Schrader's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

45. PSCo and Schrader may dispute all or part of a bill for Future Response Costs submitted under this Order, if PSCo and/or Schrader allege that EPA has made an accounting error, or if PSCo and/or Schrader allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, the disputing party shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 43 on or before the due date. Within the same time period, the disputing party shall pay the full amount of the contested costs into an interest-bearing escrow account. The disputing party shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 37(c) above. The disputing party shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within thirty (30) days after the dispute is resolved.

XVI. DISPUTE RESOLUTION

46. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

47. If Respondents object to any EPA action taken pursuant to this Order, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within ten (10) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have fifteen (15) days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

48. Any agreement reached by the parties to the dispute pursuant to this Section shall be in writing and shall, upon signature by each of the parties to the dispute, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the office director level or higher will issue a written

decision on the dispute to Respondents. The management official shall endeavor in good faith to provide a written decision within fourteen (14) days. EPA's decision shall be incorporated into and become an enforceable part of this Order.

Respondents' obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs first.

XVII. FORCE MAJEURE

49. Each Respondent agrees to perform all requirements of this Order that apply to it within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. *Force majeure* includes, but is not limited to, adverse river-flow conditions or adverse weather conditions under which implementation of the Work would be unsafe. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance.

50. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, the Respondent responsible for the obligation shall notify EPA orally within 48 hours of when that Respondent first knew that the event might cause a delay. Within three (3) days thereafter, that Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; that Respondent's rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of that Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude that Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

51. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify that Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify all Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

52. PSCo and Schrader shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 53 and 54 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by PSCo and Schrader shall include completion of the activities under this Order, the Removal Action Plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

53. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 53(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$5,000	15th through 30th day
\$32,500	31st day and beyond

b. Compliance Milestones

- Completion of all Work described in the Removal Action Plan in accordance with the schedule included therein.
- Payment of Past, Interim and Future Response Costs within timeframe established by this Order.

54. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate progress reports:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$100	1st through 14th day
\$500	15th through 30th day
\$1,000	31st day and beyond

55. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 66 of Section XX, PSCo and Schrader shall be liable for a stipulated penalty in the amount of \$500,000.

56. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies PSCo and Schrader of any deficiency; and 2) with respect to a decision by the EPA management official at the office director level or higher, under Paragraph 48 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

57. Following EPA's determination that PSCo and Schrader have failed to comply with a requirement of this Order, EPA may give PSCo and Schrader written notification of the failure and describe the noncompliance. EPA may send PSCo and Schrader a written demand for payment of the penalties. However, penalties

shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified PSCo and Schrader of a violation.

58. All penalties accruing under this Section shall be due and payable to EPA within 30 days of PSCo's and/or Schrader's receipt from EPA of a demand for payment of the penalties, unless PSCo and/or Schrader invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to Mellon Bank, Attn: Superfund Accounting, Lockbox 360859, Pittsburgh, PA, 15251-6859 and shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 08HE, the EPA Docket Number CERCLA-08-2005-0003 and Respondent's name and address. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 43(c).

59. The payment of penalties shall not alter in any way PSCo's and Schrader's obligation to complete performance of the Work required under this Order.

60. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

61. If PSCo and Schrader fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. PSCo and Schrader shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 58. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of PSCo's and Schrader's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order or in the event that EPA assumes performance of a portion

or all of the Work pursuant to Section XX, Paragraph 66. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

XIX. COVENANT NOT TO SUE BY EPA

62. In consideration of the actions that will be performed and the payments that will be made by PSCo and Schrader under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against PSCo and Schrader pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Past Response Costs and Future Response Costs. This covenant not to sue shall take effect upon receipt by EPA of the Past Response Costs due under Section XV of this Order and any Interest or Stipulated Penalties due for failure to pay Past Response Costs as required by Sections XV and XVIII of this Order. This covenant not to sue is conditioned upon the complete and satisfactory performance by PSCo and Schrader of their obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to PSCo and Schrader and does not extend to any other person.

63. In consideration of the City's performance of reasonable steps pursuant to this Order, the City's agreement to deed restrict the property it owns within the Site and the City's continued compliance with all of the requirements of Section 107(q) of CERCLA, 42 U.S.C. § 9607(q), except as otherwise specifically provided in this Order, EPA covenants, pursuant to Section 107(q)(3), 42 U.S.C. § 9607(q)(3), not to sue or to take administrative action against the City pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Past Response Costs and Future Response Costs.

XX. RESERVATIONS OF RIGHTS BY EPA

64. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health or welfare or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances or pollutants or contaminants, or hazardous or solid waste on, at, or from the Site.

Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring PSCo and Schrader in the future to perform additional activities pursuant to CERCLA or any other applicable law.

65. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves; and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by any Respondent to meet a requirement of this Order that is applicable to it;

b. liability for costs not included within the definitions of Past Response Costs or Future Response Costs;

c. liability for performance of response actions other than the Work, including, but not limited to, response actions which address objectives different than those delineated in this Order;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site;

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site; and

h. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials into or from the landfill located on the Site, except as specifically described within the Removal Action Plan.

66. Work Takeover. In the event EPA determines that PSCo and Schrader have ceased implementation of any portion of the Work, are seriously or repeatedly

deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. PSCo and Schrader may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that PSCo and Schrader shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENTS

67. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Past Response Costs, Future Response Costs, or this Order, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

68. These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 65 (b), (c), and (e) - (h), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

69. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXII. OTHER CLAIMS

70. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

71. Except as expressly provided in Section XIX (Covenant Not to Sue by EPA) and Section XXIII (Contribution Protection), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

72. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION PROTECTION

73. The Parties agree that PSCo and Schrader are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Order. The “matters addressed” in this Order are the Work, Past Response Costs, and Future Response Costs. Nothing in this Order precludes the United States or PSCo and Schrader from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery. Notwithstanding this or any other provision of this Order, PSCo and Schrader do not waive contribution rights against each other for the costs that each has incurred or will incur (beyond those costs for reimbursement of EPA expenses) in complying with this Order or

complying with Administrative Order on Consent CERCLA-08-2004-0005 and Administrative Order on Consent CERCLA-08-2004-0014.

74. The Parties agree that the City is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 107(q)(3) and 113(f) of CERCLA, 42 U.S.C. § 9607(q)(3) and 113(f), respectively, for “matters addressed” in this Order. The “matters addressed” in this Order are the Work, Past Response Costs, and Future Response Costs. This contribution protection is contingent upon continued compliance by the City with the requirements of Section 107(q) and the terms of this Order that apply to it.

XXIV. INDEMNIFICATION

75. PSCo and Schrader shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of PSCo and Schrader, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, PSCo and Schrader agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of PSCo and Schrader, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of PSCo and Schrader in carrying out activities pursuant to this Order. Neither PSCo and Schrader nor any such contractor shall be considered an agent of the United States.

76. The United States shall give PSCo and Schrader notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with PSCo and Schrader prior to settling such claim.

77. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work

on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, PSCo and Schrader shall each indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between PSCo and Schrader and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

78. At least 7 days prior to commencing any on-Site work under this Order, PSCo shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of two million dollars, combined single limit. Within the same time period, PSCo shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Order, PSCo shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of PSCo in furtherance of this Order. If PSCo demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then PSCo need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. FINANCIAL ASSURANCE

79. In order to guarantee the full and final completion of the Work, within 30 days of the Effective Date of this Order, PSCo shall establish and maintain financial security for the benefit of EPA in the amount of \$8.8 million in one or more of the following forms:

a. A surety bond unconditionally guaranteeing payment and/or performance of the Work, issued by a surety company that is (i) among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury and (ii) acceptable in all other respects to EPA;

b. One or more irrevocable letters of credit, payable to or at the direction of EPA, issued by one or more financial institution(s) (i) that have the authority to issue letters of credit, (ii) whose letter-of-credit operations are regulated and

examined by a U.S. Federal or State agency, and (iii) that are acceptable in all other respects to EPA;

c. A trust fund established for the benefit of EPA, governed by terms and conditions acceptable in all respects to EPA, and administered by a trustee (i) that has the authority to act as a trustee; (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency; and (iii) that is acceptable in all other respects to EPA;

d. A policy of insurance issued by an insurance carrier, and governed by terms and conditions, acceptable in all respects to EPA;

e. A written guarantee to perform the Work executed in favor of EPA by one or more parent companies or subsidiaries of PSCo, or by one or more unrelated companies that have a substantial business relationship with PSCo; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. Part 264.143(f) with respect to the cost of the Work that it proposes to guarantee hereunder; or

f. A written guarantee to perform the Work executed in favor of EPA by PSCo; provided, however, that PSCo must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. Part 264.143(f) with respect to the cost of the Work that it proposes to guarantee hereunder.

80. If PSCo seeks to post financial assurance for its completion of the Work by means of a guarantee pursuant to Subparagraph (e) or (f) above, it shall also comply with the other relevant requirements of 40 C.F.R. Part 264.143(f), 40 C.F.R. Part 264.151(f), and 40 C.F.R. Part 264.151(h)(1) relating to these forms of financial assurance, including, but not limited to, (i) the initial submission of required reports and statements from the guarantors' chief financial officer and independent certified public accountant; (ii) the annual re-submission of such reports and statements within ninety (90) days after the close of each of the guarantors' fiscal years; and (iii) the notification of EPA within ninety (90) days after the close of any of the guarantors' fiscal years in which any such guarantor no longer satisfies the financial test requirements set forth at 40 C.F.R. Part 264.143(f)(1).

81. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. The financial assurance instrument(s) provided pursuant to this Section (including, without limitation, the original versions of letters of credit and

other negotiable instruments issued for EPA's benefit) shall be submitted by PSCo to Daniela Golden, U.S. EPA, ENF-RC, 999 18th Street, Suite 300, Denver, CO 80202. PSCo shall also provide copies of all such financial assurance instruments to the other representatives of the EPA as specified in Section VII.

82. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, or in the event that PSCo becomes aware of information indicating that any financial assurances provided pursuant to this Section no longer satisfy the requirements set forth herein (including, without limitation, that any third-party provider of such assurances such as a surety, trustee, financial institution, insurer, and/or guarantor no longer qualifies to provide such assurances), then PSCo shall, within thirty (30) days of receipt of notice of EPA's determination or, as the case may be, within thirty (30) days of becoming aware of such information, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 46 of this Order. In addition, if at any time EPA notifies PSCo that the anticipated cost of completing the Work has increased, then, within thirty (30) days of receipt of such notification, PSCo shall obtain and present to EPA for approval a revised form of financial assurance (and otherwise acceptable under this Section) that reflects such cost increase. PSCo's inability to post financial assurance for completion of the Work shall in no way excuse performance of any other requirements of this Order, including, without limitation, PSCo's obligation to complete the Work in strict accordance with the terms hereof.

83. Any and all financial assurance instruments provided pursuant to this Section shall provide EPA with immediate access to resources, whether in cash or in kind, to continue and complete the Work in the event EPA determines that PSCo (i) has ceased implementation of any portion of the Work, (ii) is significantly or repeatedly deficient or late in its performance of the Work, or (iii) is implementing the Work in a manner which may cause an endangerment to human health or the environment. PSCo may invoke the procedures set forth in Section XVI (Dispute Resolution), to dispute EPA's determination that any of the circumstances described in clauses (i), (ii), or (iii) of this Paragraph have occurred. If EPA has determined that any of the circumstances described in clauses (i), (ii), or (iii) of this Paragraph have occurred, and if EPA is nevertheless unable after reasonable efforts to secure the resources (whether in cash or in kind) necessary to continue and complete the Work from the financial assurance instrument(s) posted by PSCo pursuant to this Section, then, in such event, and upon receiving written notice

from EPA, PSCo shall immediately deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount equal to the estimated cost of the remaining Work to be performed as of such date, as determined by EPA.

84. (a) Reduction of Amount of Financial Assurance. If PSCo believes that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 79 above after the effective date of this Order, PSCo may, on any anniversary date of entry of this Order, or at any other time agreed to by PSCo and EPA, petition EPA in writing to request a reduction in the amount of the financial assurance provided under this Section so that the amount of the financial assurance is equal to the estimated cost of the remaining Work to be performed. PSCo shall submit a written proposal for such reduction to EPA which shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. The decision to accept such a proposal and to allow a reduction of the amount of financial assurance in accordance herewith shall rest in EPA's sole discretion. If EPA decides to accept such a proposal, EPA shall notify PSCo of such decision in writing. After receiving EPA's written acceptance, PSCo may reduce the amount of the financial assurance in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, PSCo may reduce the amount of the financial assurance required hereunder only in accordance with a final EPA management decision resolving such dispute.

(b) Change of Form of Financial Assurance. If PSCo desires to change the form of financial assurance provided pursuant to this Section after the effective date of this Order, PSCo may, on any anniversary date of entry of this Order, or at any other time agreed to by PSCo and EPA, petition EPA in writing to request a change in the form of financial assurance provided hereunder. PSCo shall submit a written proposal for such change to EPA which shall specify, at a minimum, the cost of the remaining Work to be performed, the basis upon which such cost was calculated, and a detailed description of the proposed revised form of financial assurance. The decision to accept such a proposal and to allow a change in the form of financial assurance shall rest in EPA's sole discretion. If EPA decides to accept such a proposal, EPA shall notify PSCo of such decision in writing. After receiving EPA's written acceptance, PSCo may change the form of financial assurance in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, PSCo may change the form of financial

assurance required hereunder only in accordance with a final EPA management decision resolving such dispute.

(c) Release of Financial Assurance. If PSCo receives written notice from EPA in accordance with Paragraph 90 hereof that the Work has been fully and finally completed in accordance with the terms of this Order, or if EPA otherwise so notifies PSCo in writing, PSCo may petition EPA to allow the release or discontinuance of the financial assurance required hereunder. PSCo shall submit a written proposal for such release to EPA which shall specify the basis for the requested release (e.g., full and final completion of the Work, etc.). The decision to accept such a proposal for release of the financial assurance shall rest in EPA's sole discretion. When EPA decides to accept such a proposal, EPA shall notify PSCo of such decision in writing. After receiving EPA's written acceptance, PSCo may release the financial assurance in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, PSCo may release the financial assurance required hereunder only in accordance with a final management decision resolving such dispute.

XXVII. REASONABLE STEPS AND DUE CARE

85. Respondents shall take all reasonable steps and due care to stop any continuing release and prevent any future release of hazardous substances within the NAPL plume area and to prevent or limit human, environmental or natural resource exposure to the hazardous substances released from their property. The reasonable steps to be taken pursuant to this Order are described in a list which is attached as Appendix G, and is incorporated by reference into this Order.

86. To enable to the City to perform certain actions in the future, PSCo shall pay to the City the sum of \$200,000 and Schrader shall pay to the City the sum of \$1 per square foot, up to a maximum of \$50,000, for a passive vapor barrier/venting system for the new community center. Fourteen days after the Effective Date, Schrader shall establish an escrow account in the amount of \$42,000, with interest payable to Schrader, to secure payment to the City of the sums Schrader is required to pay under this Paragraph and shall provide documentation to the City that the escrow account in the stated amount has been established. The passive vapor barrier/venting system shall be designed and constructed in accordance with the specifications set forth in Appendix K. In consideration of these payments, the City waives and forever releases any and all

claims against PSCo and Schrader for any costs or liabilities the City incurs as a result of taking the reasonable steps hereunder within the NAPL plume as described in Appendix F, including, without limitation, any costs or liabilities incurred as a result of petroleum products within the NAPL plume and any costs the City incurs, if any, to install, operate, and maintain an active vapor treatment system for the new community center.

XXVIII. MODIFICATIONS

87. The OSC may make modifications to any plan or schedule or Removal Action Plan in writing or by oral direction, provided such modifications do not materially change the scope of Work. Where emergency circumstances exist, the OSC may make any modifications necessary to protect public health or the environment. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

88. If PSCo seeks permission to deviate from any approved work plan or schedule, PSCo's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. PSCo may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 81, which the OSC will endeavor in good faith to provide within five (5) days of the request.

89. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

XXIX. NOTICE OF COMPLETION OF WORK

90. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, but not limited to, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondents. If EPA determines that any such Work has not been

completed in accordance with this Order, EPA will notify PSCo, provide a list of the deficiencies, and require that PSCo modify the Removal Action Plan if appropriate in order to correct such deficiencies. PSCo shall implement the modified and approved Removal Action Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by PSCo to implement the approved modified Removal Action Plan shall be a violation of this Order.

XXX. SEVERABILITY/INTEGRATION/APPENDICES

91. If a court issues an order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, each Respondent shall remain bound to comply with all provisions of this Order that apply to it that have not been invalidated or determined to be subject to a sufficient cause defense by the court's order.

92. This Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. The following appendices are attached to and incorporated into this Order:

- A. Action Memorandum
- B. Removal Action Plan
- C. Removal Action Design Submittal
- D. Restoration Plan
- E. General Site Map
- F. Plume Map
- G. Reasonable Steps
- H. Environmental Covenant
- I. Screening Level Human Health Risk Analysis
- J. Removal Action Alternatives Evaluation
- K. Design Plans and Specifications for Passive Vapor Barrier/Venting System

It is so ORDERED and Agreed this 10 day of November, 2004.

BY: [Signature]

Doug Skie, Director

Preliminary Assessment and
Emergency Response Branch
Region 8

U.S. Environmental Protection Agency

DATE: 11/10/04

BY: [Signature]

Michael Risner, Director

Legal Enforcement Program
Region 8

U.S. Environmental Protection Agency

DATE: 11/10/04

BY: [Signature]

Sharon Kercher, Director

Technical Enforcement Program
Region 8

U.S. Environmental Protection Agency

DATE: 11-10-04

EFFECTIVE DATE: 11/10/04

XXXI. EFFECTIVE DATE

93: This Order shall be effective when the Order is signed by EPA.

The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to bind the parties they represent to this document.

Agreed this ____ day of October, 2004 .

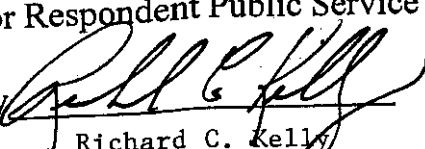
For Respondent Schrader Oil Co.

By _____

Title _____

For Respondent Public Service Company of Colorado

By


Richard C. Kelly

Title President and Chief Operating Officer

For Respondent City of Fort Collins

By _____

Title _____

XXXI. EFFECTIVE DATE

93. This Order shall be effective when the Order is signed by EPA.

The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to bind the parties they represent to this document.

Agreed this ____ day of ^{November}~~October~~, 2004 .

For Respondent Schrader Oil Co.

By _____

Title _____

For Respondent Public Service Company of Colorado

By _____

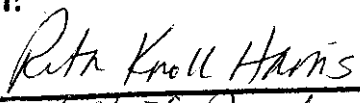
Title _____

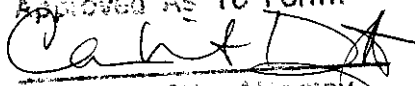
For Respondent City of Fort Collins

By 
Darin A. Atteberry

Title Interim City Manager

ATTEST:


City Clerk / Chief Deputy

Approved As To Form:

City Attorney

XXXI. EFFECTIVE DATE

93. This Order shall be effective when the Order is signed by EPA.

The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to bind the parties they represent to this document.

Agreed this 9th day of November, 2004 .

For Respondent Schrader Oil Co.

By Stephen Schradler

Title Vice President

For Respondent Public Service Company of Colorado

By _____

Title _____

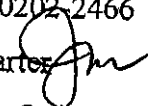
For Respondent City of Fort Collins

By _____

Title _____



TRANSMITTAL

DATE: November 9, 2004
TO: U.S. E.P.A. Region 8
999 18th St., Suite 300
Denver, CO 80202-2466
FROM: Jennifer McCarter 
RE: Administrative Order on Consent (AOC) for the Poudre River Site

Attached are the following documents:

- A copy of the above referenced AOC, dated October 28, 2004, including amended pages issued by EPA on November 1, 2004, with original signature by Richard C. Kelly, President and Chief Operating Officer, on behalf of Public Service Company of Colorado (PSCo)
- Certificate of Insurance for Comprehensive General Liability and Automobile Liability, showing PSCo as insured and EPA Region 8 as Certificate Holder
- Copy of the CGL policy declarations
- Copy of the Business Auto policy declarations

Additionally, for the record, we would like to provide the following clarifications with respect to certain paragraphs of the AOC, as follows:

Sec. I Par. 1 (and elsewhere as applicable): the correct corporate reference should be "Public Service Company of Colorado, d/b/a Xcel Energy" ("PSCo"), not "XCEL Energy, Inc."

Sec. XV Par. 43: In order to expedite payment for Future Response Costs, PSCo requests that invoices for its share of such costs be submitted to: "Manager of Waste and Remediation, Xcel Energy, 4653 Table Mountain Drive, Golden, CO 80403".

Sec. XXVIII Par. 88: The reference to paragraph 81 appears to be incorrect, and should probably reference paragraph 87, for clarity.

Section XXX Par. 92: Per an email from PSCo to EPA and the other stakeholders on November 2, 2004, Appendix D will include a summary of the Restoration Plan, as follows:

- The "Basis for Restoration - revised" memorandum dated October 29, 2004
- The Aquatic Habitat Survey (memo and drawings/photos)
- The Planting List
- The Inventory of Existing Trees
- LP-430-501 as an 11x17" figure
- LP-430-502 as an 11x17" figure

Receipt acknowledged, November 9, 2004, on behalf of EPA Region 8 by:

Matt Tolun, Senior Affx.
Name and Title

Matt Tolun
Signature

Jennifer McCarter, REM
Environmental Analyst
ESG, 4653 Table Mountain Drive
Golden, CO 80403
PH: 720-497-2166
FAX: 720-497-2117
CELL: 970-227-4545